STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
SAAD, P.J., and DONOFRIO and GLEICHER, JJ.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA and its LOCAL 6000; MICHIGAN CORRECTIONS ORGANIZATION, SEIU LOCAL 526M; MICHIGAN PUBLIC EMPLOYEES, SEIU LOCAL 517M; and MICHIGAN STATE EMPLOYEES ASSOCIATION, AFSCME, LOCAL 5,

Plaintiffs-appellants,

v.

NATALIE YAW, EDWARD CALLAGHAN, and ROBERT LABRANT, in their official capacities as Members of the Michigan Employment Relations Commission; RICHARD "RICK" SNYDER, in his official capacity as Governor of the State of Michigan; WILLIAM D. SCHUETTE, in his official capacity as Attorney General of the State of Michigan; and STATE OF MICHIGAN,

Defendants-appellees.

Supreme Court No. 147700

Court of Appeals No. 314781

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other state governmental action is invalid.

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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The legal question at issue here is the Civil Service Commission's constitutional authority to control the terms and conditions of civil service employment and the Legislature's ability to override that authority. This is well-plowed ground. Over seventy years of case law establishes a clear and consistent guideline regarding the Commission's authority concerning the matters committed to its control in paragraph 4 of Article 11, § 5. Defendants cannot deny that the court below has devised a radically new theory of the Commission's constitutional powers *vis a vis* the Legislature, under which some of the Commission's powers are more plenary than others. As accurately described by Defendants, the panel majority discerns a "hierarchy" in paragraph 4:

> The Commission's regulatory authority is therefore subservient to whatever rules, specifications, or requirements the Legislature enacts with respect to 'conditions of employment' for all employees under article 4, § 49.
>
> * * *
>
> Simply put, the constitutional hierarchy establishes that the Commission's powers regarding conditions of employment are inferior to those of the Legislature. The Court of Appeals recognized this hierarchy when it held that 'the people of Michigan intended for the Legislature to retain authority . . . Over the hours and conditions of employment over *all* employees, without excluding those in the classified civil service.' *Id.* at 15a (emphasis added) Thus, contrary to the Unions' position, the Commission's sphere of authority with respect to the conditions of employment in the classified service is not 'exclusive and plenary.'

(Defs' Brief, pp 10-11). This court-made hierarchy is one that the words themselves do not suggest and that no court heretofore has recognized.

Given that this unprecedented theory has never been adopted or even suggested by any court over decades of close and continuous judicial attention to the matter, its proponents must resort to wordplay and revisionist history in their attempt to give it a semblance of credibility.

A. The Words of the Constitution Are Clear and Well-Understood, and Do Not Support the Panel Majority's Sui Generis Interpretation.

The notion that use of the word "regulate" in describing the Commission's responsibility and authority regarding "conditions of employment" imposes a "hierarchy" of powers under which the Commission is subordinate to the Legislature in that crucial area has no arguable basis, for at least the following reasons:

First, the plain meaning as understood by the drafters and voters does not suggest subordinate authority. The dictionary citations supplied by Defendants and Judge Saad define "regulate" in terms of governing *according to rule*, without specifying whether the rule is made by the regulator or by a higher authority. Regulating simply means consistent, predictable, rule-bound governance as opposed to control by fiat or caprice. The Constitution uses "regulate" elsewhere to connote control by rules (*see*, Plaintiffs' Brief p 19) and would not have been understood as implying much less specifying, subordination to the Legislature.

Second, paragraph 4 sets forth six areas of Commission authority, using six different verbs. There is no wording separating or distinguishing any of them as conferring less authority than the others. (Compare, Article 11, § 5, paragraph 7, added in 1963, which specifically establishes an oversight role for the Legislature with respect to certain actions by the Commission to "fix" rates of compensation).

Third, paragraph 4 also recognizes the Commission's authority to "make rules and regulations covering all personnel transactions..." While this clause also uses the language of regulation, Defendants argue that somehow this power, like the preceding ones, is "different in scope and in kind from the authority to 'regulate'." (Defs' Brief p 9). Regardless of whether the Commission's power to regulate conditions of employment is found to be subordinate to the others listed in paragraph 4, the Commission's rules allowing for negotiation of fair share agreements

involve "personnel transactions," i.e., transfers to bargaining representatives under collective bargaining agreements.[1]

Finally, noticeably absent both from the ruling below and from Defendants' Brief is any attempt to explain *why* the drafters would have devised a constitutional structure in which the Commission has plenary authority concerning every matter *except* conditions of employment. If the original intent was to subordinate conditions of employment in a constitutional hierarchy of powers, one would expect some suggestion of that in the wording and some contemporaneous explanation for it. The Constitutional Convention record reflects no such discussion.

B. The Historical Context Provides No Support For the Ruling Below.

Defendants' principal argument in support of the panel majority's attempt to "harmonize" Article 11, § 5 with Article 4, §§ 48 and 49 is based on an inventive re-writing of constitutional history. Defendants posit that by drafting Article 4, § 48 with an express exception for civil service while omitting the exception from § 49, at the same time that they "also created the Civil Service Commission" (Defs' Brief p 4), the Delegates intended to give the Commission "lesser authority" with respect to conditions of employment. (*Id.* pp 1-2, 8-10). This tortured revisionist history is fraught with error and inconsistent with actual events.

Defendants should go back to the history books. The Civil Service Commission was not created in the 1963 Constitution. (*Cf*, Defs' Brief p 4). Nor is it the case (except in a misleadingly

[1] Inasmuch as they involve employment-related payments by employees, fair share agreements concern "personnel transactions." The term "transaction" is commonly understood to denote the making of a bargain, agreement or settlement. *Oberlies v Searchmont Resort, Inc*, 246 Mich App 424, 430; 633 NW2d 408, 413 (2001)("'Transact'" is defined as 'to carry on or conduct (business, negotiations, etc.) to a conclusion or settlement.'" citing, Random House Webster's College Dictionary (1997)); *Zine v Chrysler Corp*, 236 Mich App 261, 280; 600 NW2d 384, 397 (1999)("Black's Law Dictionary . . . defines [transaction] as: 'Act of transacting or conducting any business; negotiation; management; proceeding; that which is done; an affair. *** It must therefore consist of an act or agreement, or several acts or agreements having some connection with each other, in which more than one person is concerned, and by which the legal relations of such persons between themselves are altered. [Black's Law Dictionary (5th ed)]."

superficial sense) that "article 11, § 5 and article 4, § 49 were adopted simultaneously . . . ." (*Id.* p 10). The historical development of the clauses in question unfolded as follows:

Article 4, § 49

- The precursor to Article 4, § 49 originally was adopted as Article 5, § 29 of the 1908 Constitution. From the very beginning, it referred to the Legislature's "power to enact laws relative to the hours and conditions of employment." The only changes made thereafter were the extension to men in 1920 and some streamlining in the 1963 Constitution that did not alter the phrase "hours and conditions of employment." (See, Plaintiffs' Brief, pp 33-34).
- Prior to enactment of Article 4, § 48 as a new provision in the 1963 Constitution, courts looked to the Legislature's general police powers -- not to Const 1908, Article 5, § 29 -- as authority for enactment of labor relations and collective bargaining laws, including the Labor Mediation Act, 1939 PA 176, and the Hutchinson Act, 1947 PA 336.[2]

The Civil Service Amendment

- Voters constitutionalized the Civil Service Commission in 1941. The language describing the Commission's responsibilities and powers, including to "regulate all conditions of employment in the classified service," has continued unchanged to the present.

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[2] See, Labor Mediation Act, MCL 423.19, and *Local Union No 876, IBEW v Labor Mediation Board*, 294 Mich 629, 635-37; 293 NW 809 (1940); and see, *Detroit v DPOA*, 408 Mich 410, 450 n 20; 294 NW2d 68 (1980), with respect to the Hutchinson Act. The Delegates understood that the purpose of the amendment they were drafting as Article 4, § 48 was to enshrine the Legislature's existing police power to enact employment relations and collective bargaining laws such as the Labor Mediation Act and the Hutchinson Act. (Delegate Binkowski: ". . . the legislature has this power, and not only has it the power but it has already used it. I think it is act 336 of the public acts of 1947 which is commonly known as the Hutchinson Act, which prevents public employees from striking and sets out methods or procedures for resolving the dispute." 2 Official Record, Constitutional Convention 1961, p 2338; Delegate Hutchinson: "As a matter of fact, the legislature has acted in this field . . . it has acted by an act in 1947 and by 2 or 3 amendments since that time to the Bonine-Tripp act, the state labor mediation act, which provides procedures for the mediation of disputes which arise in public employment." *Id.*)

- From the beginning and continuing to the present – and notwithstanding that for decades before the 1941 civil service amendment the Constitution had established the Legislature's authority to "enact laws relative to the hours and conditions of employment" in Const 1908, Article 5, § 29 – this Court and lower courts following its guidance consistently described the Commission's powers as "plenary" and as superior to the Legislature's within its sphere of authority, without recognizing any "hierarchy" of powers or making any exception for "conditions of employment." The decisions recognizing what Defendants term "the Commission's so-called 'plenary' authority" (Defs' Brief p 21) are cited throughout Plaintiffs' Brief.
- The civil service carve-out was added in Const 1963, Article 4, § 48. The purpose was to harmonize that new section with Article 11, § 5 because the latter provision specifically commits personnel matters to the Commission.[3] Article 4, § 49, meanwhile, was retained as a nod to its historical significance and popularity, because deleting it would send the wrong message. (See Plaintiffs' Brief pp 35-36). To the extent that not repeating the civil service exclusion in § 49 was a conscious decision (and there is no indication as to whether it was), it is far more likely that the drafters saw no need to do so because § 48 dealt with the matters addressed in the civil service section: collective bargaining and labor relations, while § 49 was drafted, and had been interpreted and applied for years, as allowing for limits on hours and physical conditions of work in order to "safeguard the health and morals of . . .

[3] "The state classified civil service is exempted because the constitution has specific provisions in this area." Address to the People" p. 40 (1962), 2 Official Record, Constitutional Convention 1961, p. 3377. Article 11, § 5 and Article 4, § 48 both deal specifically with the terms and conditions of public employment, hence the necessity for harmonizing them. "Constitutional provisions must be construed with reference to each other when relating to the same subject matter." *Frey v Dept of Mgmt & Budget*, 429 Mich 315, 334; 414 NW2d 873 (1987)(quoting *Root v Mayor*, 3 Mich 433 (1855)).

residents." (quoting Delegate Hoxie, 2 Official Record, Constitutional Convention 1961, p 2341; see also cases discussed at pp 33-34 of Plaintiffs' Brief).[4]

Defendants' argument is based entirely on a negative inference, i.e., that the absence of a civil service exception in § 49 signaled a significant change in the meaning of Article 11, § 5. Given that a primary purpose of the civil service amendment was to protect the Commission's independence from interference by politicians, and given the case law affirming the Commission's plenary and exclusive authority, had it been the intention to introduce for the first time a "hierarchy" granting the Legislature new powers over "conditions of employment" in the classified service, wouldn't some discussion of that be found in the Constitutional Convention record and wouldn't some language expressing that change have been drafted into the Constitution?

The constitutional provisions that *should be* harmonized – and that intentionally *were* harmonized – are Article 4, § 48 and Article 11, § 5. Both deal with the matters at issue here - public employee labor relations and collective bargaining. Indeed, the kind of enactments that the drafters of § 48 had in mind, the Labor Mediation Act and the Hutchinson Act, were the vehicles used to enact "right to work."[5] The "conditions of employment" addressed by § 49 were physical conditions that would affect health and safety, not the kind of "conditions" regulated by the

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[4] The framers of the 1963 Constitution are presumed to have known that § 49 had been applied specifically in the context of legislation regulating of hours of employment for all employees. (See cases cited at pp 33-34 of Plaintiffs' Brief). "Where a constitutional provision has received a settled judicial construction, and is afterward incorporated into a new or revised constitution, or amendment, it will be presumed to have been retained with a knowledge of the previous construction, and courts will feel bound to adhere to it." *Richardson v Secretary of State*, 381 Mich 304, 311; 160 NW2d 883 (1968)(quoting, 16 CJS, *Constitutional Law*, § 35, pp 114, 115); *People v Kirby*, 440 Mich 485, 491-492; 487 NW2d 40 (1992).

[5] 2012 Public Act 438 amended the Labor Mediation Act. Public Act 349 amended the Public Employment Relations Act, 1965 Public Act 379, which itself amended the Hutchinson Act. *Holland School Dist. v Holland Education Ass'n*, 380 Mich 314, 319; 157 NW2d 206 (1968).

Commission's collective bargaining rules. "Conditions of employment" means two very different things in Article 4, § 49 and Article 11, § 5.[6]

C. Article 4, § 49 Cannot be Harmonized with Article 11, § 5.

Article 4, § 48, with its express exception for civil service, is easily reconciled with Article 11, § 5, as was intended. The same cannot be said for Article 4, § 49. The panel majority's attempt at "harmonizing" the two clauses shows that it cannot be done in any rational way. The majority opinion below states that:

> The reference to 'conditions of employment' in both Const 1963, art 4, § 49 and art 11, § 5 can be read consistently and without deviating from either section's plain language and without encroaching on or expanding the authority granted constitutionally to either the Legislature or the CSC. Const 1963, art 4, § 49 authorizes the Legislature to enact laws relative to the hours and conditions of employment generally, subject only to the CSC's authority to *regulate* conditions of employment in the classified civil service, in addition to performing other specifically enumerated duties.

UAW v Green, 302 Mich App 246, 267; 839 NW2d 1 (2013) (emphasis in original). The panel majority's approach to harmonizing the two is driven by the court's evaluation of the purpose of the legislation: "In further considering whether this is within the province of the Legislature or the CSC, we must examine the nature of the agency fees and what interests are affected by PA 349." *Id.* at 274-275.

Perhaps wary of a rule of constitutional analysis that involves weighing lawmakers' (imputed) purposes or interests on the judicial scales, the Attorney General posits a simple categorical rule that does not call for much balancing: when the Legislature legislates conditions of

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[6] While referring to § 51 rather than § 49 of Article 4, the following observation in *Dep't of Transp v Brown,* 153 Mich App 773; 396 NW2d 529 (1986), is apt: ". . . we conclude that the prohibition of legislation for resolution of employment disputes of classified civil service employees does not extend to the area of occupational health and safety. In reality, the Legislature in this situation is not providing for the resolution of employment disputes involving state classified employees, but is merely securing the health and safety of all employees." *Id.* at 782.

employment, the Commission's constitutional authority is displaced.[7] "Simply put, the constitutional hierarchy establishes that the Commission's powers regarding conditions of employment are inferior to those of the Legislature." (Defs' Brf p 10). "For conditions of employment, the Commission is subordinate to the Legislature... The Commission does not have authority to disregard the Legislature in this area." (*Id.* p 2).

While the Attorney General's suggested approach has the virtue of simplicity, its inevitable outcome would be to erode the political independence of the classified service. A rule that subordinates all Commission action concerning conditions of employment to the Legislature would swallow much of the Commission's constitutional independence. To take just a few examples, the Commission's rules on political activity by classified employees (Rule 1-12), layoffs (Rule 2-4, discipline (Rule 2-6), drug testing (Rule 2-7), ethical standards (Rule 2-8), leaves of absence (Rules 2-11 to 2-14), training (Rule 2-18), assignments outside the civil service (Chapter 7), and grievances, complaints and appeals (Chapter 8) arguably regulate conditions of employment and could be vetoed or supplanted by the Legislature.[8]

With respect to the Commission's Rules on collective bargaining (Rules, Chapter 6), Defendants assert, "So even assuming *arguendo* that the opportunity to organize and bargain is a

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[7] The Attorney General also appears to recognize the absence of legal support for the panel majority's attempt to manufacture a pressing First Amendment crisis as the purported justification for Public Act 349 (as discussed in Plaintiffs' Brief, pp 38-39). The constitutionality of fair share arrangements has not been open to serious question since *Abood v Detroit Bd of Education*, 43 US 200 (1977), especially in light of the protections required in later rulings for employees who do not share the union's political or ideological positions. Stray comments of some Justices taken out of context do not change that. While Defendants may wish to preserve the issue for further appeal, they concede that their view as to whether fair share agreements violate the First Amendment – as with the legal views imputed by the panel majority to some lawmakers – has no bearing on the constitutional issue before the Court in this appeal.

[8] The Commission's Rules (effective 1 October 2013) are available on line at: http://www.michigan.gov/documents/mdcs/Michigan_Civil_Service_Commission_Rules_347183_7.pdf. The Commission also promulgates detailed Regulations at: https://www.michigan.gov/mdcs/0,4614,7-147-6877_8154---,00.html.

conditions of employment under article 11, § 5 (a position Defendants do not concede), such an opportunity is still subject to the Legislature's authority to pass laws relative to the conditions of employment. Const 1963, art 4, § 49." (Def's Brief p 25). This approach to reconciling the Commission's constitutional authority as to civil service with the Legislature's general authority directly contradicts the Court's statement in *Council No 11, AFSCME v Civil Service Comm*, 408 Mich 385, 406-407; 292 NW2d 442 (1980): "We do not question the commission's authority to regulate employment-related activity involving internal matters such as job specifications, compensation, grievance procedures, discipline, collective bargaining and job performance..." Without a doubt, the approach taken by Defendants and the panel majority to resolving "a conflict between the rule-making power of the Michigan Civil Service Commission and the law-making power of the Legislature" (*Council No 11*, at 390) departs drastically from that taken by the Court.

D. The Commission's Fair Share Rules Concern a Condition of Employment

Despite the fact that the Commission's fair share rules are part of its detailed regulation of collective bargaining, which *Council 11* identified as an "internal employment-related activity involving internal matters," the panel majority distinguishes fair share agreements as "conditions *for* employment, which are matters for the Legislature." 302 Mich App at 277 (emphasis in original, citing, *Council No 11*, at 406). Picking up on this, Defendants argue that the fair share/agency fee rule is "not a matter between the employer and the employee. It is control of the relationship between the employee and a third party: the union." (Defs' Brief p. 26). But a negotiated fair share clause is not a "condition *for* employment" in the sense used in *Council No 11*. That is, it is not a requirement for obtaining or retaining employment with the State that has no connection with paid, on-duty activity. Nor can it fairly be characterized simply as an external matter between the employee and his or her bargaining representative. As is the case with all such fair share provisions, the agreements permitted under Rule 6-7.2 provide that, "*as a condition of*

continued employment," an employee who is not a member must pay a fair share service fee to the union.[9] Therefore such clauses are not simply a matter "between the employee and a third party." (Defs' Brief p 26). The employer is the party to the agreement and is necessary for its implementation. Resolving a conflict between the Commission's rule-making and the Legislature's law-making in this case should not depend on word-play, but on a straightforward analysis of whether the Commission Rule at issue regulates the employment relationship within its constitutional purview.

CONCLUSION

For the above reasons, Plaintiffs-Appellants request that the Court reverse the decision below.

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[9] Rule 6-7.2 does not impose or require a fair share rule. It simply permits the State Employer and a union to negotiate such an agreement.